BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of the Application by SBC Communications, Inc., for Authorization Under Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Service in the State of Missouri	**CC Docket No. 01-88**

REPLY COMMENTS OF THE

CONSUMER FEDERATION OF AMERICA

May 16, 2001

Respectfully submitted,
Mark Cooper, Director of Research

A. SUMMARY OF ARGUMENT

The Consumer Federation of America (CFA) believes that the application of SBC to provide inter-lata long distance telephone service in the state of Missouri should be denied. In our view, because SBC's application is premature, granting it now would harm consumers and the prospect of authentic phone competition in the state.

We share the concerns of the Department of Justice that SBC has yet to take appropriate competition-encouraging steps on advanced services, i.e., the market for Digital Subscriber Line (DSL) service is not irreversibly open. Furthermore, we remain deeply concerned about basic service affecting most consumers in the state. Simply put, the market for residential and small business local telephone service is not yet irreversibly open to competition. Evidence of this fact may be found in the relatively small number of competitive phone companies (known as CLECs for competitive local exchange carriers) providing service to Missouri residential consumers, their small market share and their lack of geographic spread.

This sorry state of competition exists for a variety of reasons. SBC has failed to provide access to operating support systems (OSS) that treat competitors at parity, and fairly priced unbundled network elements (UNEs) based on no final, justifiable TELRIC[1] costs.

At this time, the market in Missouri is not nearly where it should be to allow entry into long distance. Premature entry would not simply turn the Telecommunications Act of 1996 on its head. It also would end the prospect of local competition in the state, as well as likely seal the anti-competitive fate of the long distance market. The telecommunications industry, rife with mergers that are contributing to a re-monopolization of the sector, can ill afford further concentration. Because of the lack of competitive conditions in the state of Missouri and in the interests of sound telecommunications public policy, the Federal Communications Commission should deny SBC's application to provide long distance in the state.

B. <u>INTEREST AND EXPERTISE OF COMMENTORS</u>

The Consumer Federation of America (CFA) is a federation of 280 state and local consumer groups, whose purpose is to represent consumer interests at the Federal level.

CFA and its member groups have participated in virtually every section 271 proceeding that has come before the Federal Communications Commission, as well as several that continue at the state level. The Consumer Federation of America filed comments at the Federal Communications Commission in the Ameritech Michigan, BellSouth South Carolina and Louisiana, SBC Texas, as well as Verizon New York and Massachusetts applications. CFA filed an amicus brief in the Wichita Falls case. CFA and its member groups participated in collaborative processes in California, Texas and New York, and have filed comments in Georgia, Florida, and Oklahoma.

C. BECAUSE THE MARKET IN MISSOURI IS NOT OPEN, THE SBC APPLICATION FOR ENTRY INTO IN-REGION LONG DISTANCE MUST BE REJECTED

Based on our review of the statute, the DOJ/FCC framework, and the material supplied in this case, we conclude that the application for entry into the in-region long distance market by SBC in Missouri is premature and should not be approved. The fundamental market opening steps are not final and irreversible. As documented by the DOJ, SBC has not provided parity in provisioning DSL loops to competitive local exchange carriers (CLECs). It is obvious, based on the record, that SBC does not offer basic local service rates that are based on cost studies that comply with the Commission's TELRIC principles. The fact that competition has not spread throughout the state suggests continuing structural problems in the market.

Prematurely allowing incumbent local companies into the in-region long distance market undermines the prospects for competition. If the incumbents are allowed into long distance markets before their local markets are irreversibly open, local competition will not develop and long distance

[1] "Total element long-run incremental costs," on which rates should be based.

competition will not be vigorous.

The central public policy embraced by the Telecommunications Act of 1996 (the Act or the 1996 Act) was the introduction of competition into telecommunications markets. Congress recognized that the most difficult area to accomplish this goal was in the local exchange market of the Regional Bell Operating Companies (RBOC). The RBOC-dominated market has not only been a monopoly for a century but also has extensive contiguous geographic areas and had been part of the national Bell system. In the Modification of Final Judgment (MFJ) of the ongoing anti-trust case against the Bell System, these companies agreed to stay out of in-region long distance and to be subject to very demanding antitrust tests should they seek entry into in-region long distance.

In replacing the MFJ, Congress laid out an elaborate plan for opening local markets (in sections 251, 252 and 253 of the Act). In the case of the Regional Bell Operating Companies (RBOCs), Congress required that the incumbent local exchange companies (ILECs) meet a specific set of conditions in the local market before they are allowed to sell long distance service within their home territories (in Sections 271 and 272 of the Act).

Because the long distance market is largely in the interstate jurisdiction, the FCC possesses the ultimate authority to decide whether the RBOCs meet the conditions laid out in the Act. The FCC is to be advised by the state public utility commission and to give substantial weight to the opinion of the Department of Justice (DOJ) in reaching its decision. Nonetheless, the final authority lies with the FCC.

Over the course of the past five years, the FCC and the DOJ have articulated in detail the manner in which they believe that the RBOCs must meet the requirements of section 271. This framework was substantially completed with the rejection of the Ameritech Michigan application. Three subsequent applications were rejected because they failed to meet the terms laid out by DOJ/FCC for complying with the Act. The last four applications (including one covering two states) were approved.

The primary purpose of the Telecommunications Act is to introduce competition into all telecommunications markets and thereby deliver competitive benefits to consumers. The Conference Report gives the purposes of the Act in the opening sentence as follows:

> The committee of conference on the disagreeing votes of the two Houses on the amendments of the House to Bill (s.652), to provide for a procompetitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and service to all American by opening all telecommunications markets to competition and for other purposes, having met, after full and free conference, have agreed...[2]

Because of the pervasive market power of the ubiquitous, interconnected telecommunications network, Congress imposed a wide range of regulatory requirements on the RBOCs before they would be allowed to enter into in-region long distance. Part II of the Act, entitled "Development of Competitive Markets," is devoted almost entirely to the opening of local markets. Part III of the Act, "Entitled Special Provisions Concerning Bell Operative Companies," which includes section 271, deals almost entirely with the additional steps Bell Companies must take in opening their markets before they are allowed into in-region long distance.

In light of this structure of the Act, the Department of Justice has succinctly summarized the public policy balance that Congress struck in the 1996 Act when it addressed the issue of RBOC entry into in-region long distance:

> InterLATA markets remain highly concentrated and imperfectly competitive, however, and it is reasonable to conclude that additional entry, particularly by firms with the competitive assets of the BOCs, is likely to provide additional competitive benefits. But Section 271 reflects Congressional judgments about the importance of opening local telecommunications markets to competition as well. The incumbent local exchange carriers (LECs), broadly viewed, still have virtual monopolies in local exchange service and switched access, and dominate other local markets as well. Taken together, the BOCs have some three-quarters of all local revenues nationwide, and their revenues in their local markets are twice as large as the net interLATA market revenues in their service areas. Accordingly, more considerable benefits could be realized by fully opening the local market to competition.[3]

In short, Congress recognized that opening the local monopoly to competition was far more difficult and important than adding more competition in the long distance market. The Commission must not fall prey to the sleight of hand the local incumbents would like to play by reversing that public policy, claiming that long distance entry should come first. The argument is unsupportable, based on a series of misleading empirical analyses. More importantly, the record before the Commission demonstrates that the Missouri market is not irreversibly open to competition.

D. THE CAUSES OF MARKET FAILURE IN MISSOURI

The two key conditions for competition, operating support systems that treat competitors at parity and prices for unbundled network elements, are not present in Missouri. Regulators at the

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[2] Conference Report on the Telecommunications Act of 1996, No. 104-458, p. 1.

[3] Evaluation of the United States Department of Justice, Federal Communications Commission, In the Matter of Application of SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance for Provision of In-Region InterLATA Services in Oklahoma, CC Docket No. 97-121, May 16, 1997 (hereafter, DOJ, SBC), p. 4.

state and federal level have come to focus on actual provision of service under conditions of competition. The FCC's order in the Ameritech Michigan petition sought to elaborate and give specificity to the concept of fully loaded functioning.[4] The ongoing performance of the BOC in supplying the elements should be subject to monitoring and enforcement to ensure the availability of elements at all phases of the interaction with competitors.[5]

The certainty of the key conditions for market opening is central to entry for competitors. Without certainty, they cannot make the commitments necessary for large-scale entry into local markets. The DOJ has concluded that final conditions must be in place so that uncertainty about the terms and conditions is eliminated if the local market is to be opened to competition. Faced with this uncertainty, competitors find it extremely difficult to make major commitments to invest in local competition. The Department of Justice has concluded that they need much more certainty than that.[6]

The Department of Justice is particularly concerned about the ability of RBOCs to provide wholesale functionality—fully loaded functioning. Competitors have found that interfaces are not in place and have not even been tested in some instances. They are not automated, so that customers seeking to change service providers are forced to experience serious delays.[7] The DOJ has raised questions about the ability to provision DSL services. Many commentors have pointed out the lack of final, justifiable TELRIC prices.

Uncertainty is most likely to inhibit their entry into the less attractive markets. This leads to

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[4]FCC Michigan, summary at para. 22.
[5]FCC Michigan, para. 140 with data requirements described in paras. 164, 205, 206 and 212.
[6]DOJ, SBC, pp. 61-62.
[7]DOJ, SBC, p. vii., p. 27.

our second concern about the state of competition in Missouri: it does not appear to be widely spread across geographic or product markets.

E. THE LACK OF COMPETITION AND ITS VERY UNEVEN DISTRIBUTION IN MISSOURI RAISE DOUBTS ABOUT THE EXTENT OF MARKET OPENING

The Department of Justice and the FCC have adopted a common sense approach to the implementation of the Act. They insist that meaningful local competition actually exists as the standard for a public interest test. The Department of Justice has also pointed out that the failure of competition to spread beyond a very small number of select markets is a concern.[8]

SBC's claims about the status of competition in Missouri obscures the fundamental point that residential competition is nowhere nearly as well developed in Missouri as in New York at the time of its application there. Table 1, below, summarizes the distribution of competition between the business and residential classes in New York and Missouri, both today and at the point when the New York application was approved. We use the official FCC numbers from June 2000, since line counts presented by the various sides in these proceedings are always in dispute.

TABLE 1: EXTENT OF RESIDENTIAL COMPETITION[9]

CLEC SHARE OF MARKET (in Percent)

	NEW YORK	MISSOURI
JUNE 2000	15	3
UPON APPLICATION	7	3

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[8]DOJ, Michigan, pp. 32-33.

[9]Source: Industry Analysis Division, *Local Telephone Competition: Status as of June 30, 2000* (Federal Communications Commission, December 2000); New York Application.

Today, Missouri has less than one-fifth the level of competition as New York. Its current level of competition is less than one-half as high as it was in New York when that application was approved.

The lack of competition for residential customers is reflected in a very different geographic spread of competition. Although data is available only for the current geographic distribution of competition, it shows a sharp difference between the two states, as Table 2 shows.

TABLE 2: GEOGRAPHIC SPREAD OF COMPETITION[10]

	PERCENT OF ZIP CODES	
	NY	MO
NO CLEC	12	73
1 TO 3 CLECS	28	21
4 TO 5	18	6
6 OR MORE	42	1

The FCC data shows that almost three-quarter of the zip codes in Missouri had no CLECs. This is more than six times the percentage in New York. Another 21 percent of zip codes in Missouri had one to three of CLECs available. In Missouri, only one percent of zip codes have six or more competitors, whereas in New York, 42 percent do. To summarize the contrast, 94 percent of the zip codes in Missouri have three or fewer CLECs; almost two-thirds (60 percent) in New York have four or more.

Unfortunately, similar data does not exist for New York at the time of its approval, 15 months ago. However, the substantial difference in residential competition leads us to suspect that it had more widespread geographic competition. The analysis of market structure in Missouri suggests that there is not a base of competition to support it in the long term. This indicates that the underlying conditions for competition have not been established.

F. CONCLUSION

For the foregoing reasons, SBC's application to provide inter-lata long distance service in the state of Missouri should be denied.

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[10] Source: Industry Analysis Division, Local Telephone Competition: Status as of June 30, 2000 (Federal Communications Commission, December 2000); New York Application.